SUBJECT INDEX

	Page
Petition for Writ of Certiorari	1
Summary Statement of the Matter Involved	1
Statement of Jurisdiction	9
Questions Presented	10
Reasons Relied on for Allowance of the Writ	11
Verification	14
Brief in Support of Petition	14
Opinions Below	15
Jurisdiction	15
Argument	16
Point 1: The Statements were False	18
Point 2: The Statements were Known by the Applicant to be False	19
Point 3: The Statements were Upon Matters of Fact	20
Point 4: Under the Florida Law the Statements were Material	21
Point 5: Under the Florida Law the False Statements Rendered the Insurance Policies Voidable	25

ALPHABETICAL TABLE OF AUTHORITIES CITED

Aetna Life Insurance Co. vs. Bolding, 57 F (2) 626 20

Atlantic Coast Line Railroad Co., vs. Stringfellow, 290 U. S. 322, 78 L. Ed. 339, 64 F (2) 173 15

Bond vs. Key, 141 Fla. 160, 192 So. 599 20

Citizens State Bank vs. Adams, 140 Fla. 578, 193 So. 281 20

Page

Claflin vs. Commonwealth Insurance Co., 110 U. S. 81, 3 S. Ct. 507, 28 L. Ed. 76 24
Eastman Kodak Company, et al vs. Gray, 292 U. S. 332, 78 L. Ed. 1291, 67 F (2) 190 16
Erie Railroad Company vs. Tompkins, 304 U. S. 64, 82 L. Ed. 1188 15
Markell vs. Hilpert, 140 Fla. 842, 192 So. 392 19
Massachusetts Bonding & Insurance Company vs. Hoxie, 129 Fla. 332, 176 So. 480 12-16
Metropolitan Life Insurance Company vs. Madden, 117 F (2) 446 12-25
Mutual Life Insurance Company vs. Hilton-Green, 241 U. S. 613, 36 S. Ct. 676, 60 L. Ed. 1202 11-24-26
Mutual Life Insurance Company of N. Y. vs. Hurni Packing Company, 260 Fed. 641 20-24
New York Life Insurance Company vs. Kincaid, 122 Fla. 283, 165 So. 553 11-26
New York Life Insurance Company vs. McCarthy, 22 F (2) 241, ... 20
Ormsby, et al vs. Chase, 290 U. S. 387, 78 L. Ed. 378, 65 F (2) 521 16
Piedmont & Arlington Life Insurance Co. vs. Ewing, 92 U. S. 377, 23 L. Ed. 610 12-16
Plumb vs. Penn. Mutual Life Insurance Co., 108 Mich 94, 65 N. W. 611 24
Ruhlin vs. New York Life Insurance Co., 304 U. S. 202, 82 L. Ed. 1290 15
Section 240(a) of the Judicial Code 9-15
Smith vs. Stillman, 141 Fla. 312, 193 So. 63 20
Stevens vs. Edwards, 112 F (2) 534 19

Page

Stipcich vs. Metropolitan Life Insurance Co. 277 U. S. 311, 48 S. Ct. 512, 72 L. Ed. 895....12-16

Stringfellow vs. Atlantic Coast Line Railroad Co., 290 U. S. 322, 78 L. Ed. 339, 64 F (2) 173 15

Tampa Theatre Building vs. City of Tampa, 141 Fla. 299, 193 So. 61..... 20

Thompson vs. New York Life Insurance Co., 143 Fla. 534, 197 So. 111.....11-22-25

Travelers Protective Association of America vs. Prinsen, 291 U. S. 576, 78 L. Ed. 999, 65 F (2) 841..... 16

Wilkins, Mildred T. vs. Travelers Insurance Company, (D. C.) 33 F Supp. 117.....9-10-14

Wilkins, Mildred T. vs. Travelers Insurance Company, (C. C. A.) 15

Winer vs. New York Life Insurance Company, 143 Fla. 652, 197 So. 487....11-23-25-26

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1940

No._____

TRAVELERS INSURANCE COMPANY,
Petitioner,

vs.

MILDRED T. WILKINS,
Respondent.

PETITION FOR WRIT OF CERTIORARI

May It Please The Court:

The petition of Travelers Insurance Company, a corporation, the Petitioner herein, respectfully shows unto this Honorable Court:

SUMMARY STATEMENT OF THE MATTER INVOLVED

On May 9, 1939, the Petitioner issued two life insurance policies, each in the sum of Five Thousand Dollars, upon the life of Randolph C. Wilkins (115).

Within the contestable period the Petitioner brought suit in the United States District Court for the Southern District of Florida seeking cancellation of the two policies.

In that suit the original defendant was Mildred T. Wilkins, (the Respondent herein) widow of Randolph C. Wilkins, in her individual capacity of beneficiary and as administratrix of her husband's estate.

Subsequent to the trial but before Appeal to the United States Circuit Court of Appeals for the Fifth Circuit, Mrs. Wilkins was married to E. Jackson Butler, who joined in the Appeal and is now a party to the cause, including these proceedings (2).

The Petitioner as original plaintiff, based its suit for cancellation of the policies upon the ground that Mr. Wilkins failed to fulfill his obligation to disclose to the Petitioner material facts relating to his health, and thus permitted the Petitioner to issue the policies and receive the first premium in ignorance of such material facts.

All material matters are either admitted by the pleadings, or established by uncontradicted evidence, and there is no dispute as to what the facts are.

The difference between the parties rests upon a question of law because the respondents contend that if, in making the application for the policies, Mr. Wilkins acted in good faith, and if the material statements in the application relating to his health and consultation with physicians were true on the date when he made them and signed the application, then the life insurance

policies issued upon the faith of the application and in reliance upon the truth of the statements contained in it are valid and subsisting contracts, notwithstanding the fact that after the date when the application was signed but before the insurance company had acted upon it and issued the policies, and six weeks before the first premium was paid, Mr. Wilkins knew that the material statements relating to his health and consultation with physicians were no longer true, and notwithstanding the fact that Mr. Wilkins omitted to disclose to the insurance company the information that had come to him, although during the period mentioned he was several times in consultation with the medical examiner of the company in connection with other phases of his physical examination for insurance and although the insurance company in issuing the policies and in accepting payment of the first premium was wholly ignorant of the developments of which Mr. Wilkins had knowledge.

In short, the respondents contend that in an application for life insurance, material statements relating to the health of the applicant and his consultations with physicians are not continuing representations, and all that the law requires is that the statements be true when made. That if, before the application is acted upon, the material statements become untrue and the applicant knows that they are no longer true, he may nevertheless remain silent and permit the insurance company to change its position and issue policies upon the faith of the application, in ignor-

ance of the falsity of statements contained therein, of which falsity the applicant has knowledge, and thus gain the benefit of a contract that the insurance company would not have entered into if the applicant had disclosed the information that he possessed.

The application for the insurance was given to the agent on March 14, 1939, and Part 1 of the application was signed by Mr. Wilkins on that date (27 and 117).

There was some delay in Mr. Wilkins presenting himself for examination by the medical examiner for the insurance company (28) but on April 12, 1939, he called at the office of the medical examiner, Dr. R. D. May, and was examined by him (49).

Dr. May asked Mr. Wilkins the several questions appearing on Part 2 of the application, filled in the blank lines with the information so procured and then Mr. Wilkins, on that date, April 12, 1939, signed his name at the bottom after the form had been filled out (49 and 117).

When Dr. May's report of his examination of Mr. Wilkins was received at the home office of the company in Hartford, the assistant medical director, on April 20, 1939, wrote for a further complete chemical urinalysis, on another authenthic specimen of normal specific gravity, and for further information on the subject of reduction in weight (Exhibit D, 129).

On the same day, April 20, 1939, the company wrote by air mail to Dr. Edwin C. Swift, who had been named by Mr. Wilkins as his last medical consultant in the year 1936 (117) (Exhibit F, 131), and Dr. Swift answered promptly on April 21, 1939, giving the information requested (Exhibit G, 132).

On May 6, 1939, Dr. May advised the company that he had seen Mr. Wilkins on that day and also on the day before, had procured additional specimens of urine, had made a further investigation concerning loss of weight, and had secured Mr. Wilkins' promise to come in again the following week and give a further specimen of urine (Exhibit E, 130).

On May 18, 1939, the medical director again wrote to Dr. May asking for further information about the urinalysis (Exhibit H, 133) and on May 23, 1939, Dr. May rendered his final report (Exhibit I, 134).

The two policies were prepared bearing date May 9, 1939 (39-40 and 115), and were sent to the Jacksonville, Florida, office subject to final release upon further medical information that had been requested (40) and by telegram dated May 24, 1939 (40), were released to Stanley Bellamy, the soliciting agent, on May 25, 1939 (39).

The policies were delivered to Mr. Wilkins about the end of May or the early part of June, 1939 (33-4-5).

The first premium was paid on June 12th or 13th or 14th, 1939 (30-31 and 38).

The application upon which the policies of insurance were issued contained the following language over Mr. Wilkins' signature.

> "17. I hereby agree for myself and for any person who may have or claim an interest in any contract which may be issued upon this application, as follows:
>
> * * * * *
>
> B. That every statement herein above contained is true; and that the contract issued hereupon shall not take effect unless the first premium shall be actually paid while I am in good health in so far as I have knowledge or information" (117).

The statements contained in the application included the following:

> "13a. Have you ever had * * * fainting spells, vertigo or dizziness * * * Answer, No * * * Disease of heart? Answer, No. * *.
>
> 15A. What physician did you last consult?
>
> Answer, Dr. Swift, Jacksonville, Fla.
>
> B. When? Answer, 1936.
>
> C. For what? Answer, Fever.
>
> D. Duration of illness? Answer, 3 or 4 days.

E. Present health? Answer, good" (117).

At the bottom of the page, under the foregoing questions and answers, Mr. Wilkins signed the following agreement:

> "I hereby agree that every statement hereinabove contained is true and that they shall constitute a part of my application.
>
> (Signed) Randolph C. Wilkins" (117)

Just two weeks after making the foregoing statements to Dr. May on April 12, 1939, and prior to any of the three succeeding visits to Dr. May's office for the completion of the examination as to urine and weight, Mr. Wilkins experienced symptoms described by him as a lump in his chest and dizziness. This was on April 26 and 27 (5 and 54).

On April 28th Mr. Wilkins consulted Dr. E. C. Swift and described the symptoms mentioned and stated that on the preceding day while walking in the street he became so dizzy and fainty that he had difficulty in walking half a block to the car; sat in his car for ten or fifteen minutes and the attack passed off and since that time he had had a lump come and go in his chest (54).

On the same day—April 28—Dr. Swift caused an electrocardiogram of Mr. Wilkins' heart muscle to be made (5 and 55) and on the follow-

ing day, April 29th, having diagnosed the disease as myocarditis, a heart muscle condition, the doctor so informed Mr. Wilkins (5, 11, 75 and 86) and advised him to lighten up on his work and cut down on smoking (5, 58, 76, 86 and 87.)

Mr. Wilkins continued under Dr. Swift's care until the end of May, 1939, and was seen by the doctor professionally on May 9th, 23rd and 31st.

Mrs. Wilkins, one of the respondents, called on Dr. Swift and inquired about her husband's condition and was informed by the doctor that Mr. Wilkins certainly would not be able to get life insurance for the next year or maybe two, as a person with such a history would habitually be rejected by life insurance companies for approximately two years as an unacceptable risk (75, 76 and 78).

After experiencing the symptoms described, and after being informed by Dr. Swift of his heart condition, Mr. Wilkins reported to Dr. May three more times for the completion of his examination, on May 5th, 6th and 18th, 1939 (6, 49 and 50), but at no time did Mr. Wilkins disclose to Dr. May or to any other agent or representative of the insurance company the existence of the symptoms, or his several visits to Dr. Swift, or the making of the electrocardiogram, or the information concerning his heart condition, or the advice given to him by his doctor and the company was ignorant of the circumstances recited (6, 31, 32, 39, 41, 43, 44, 46, 47 and 50).

If the insurance company had possessed the information possessed by Mr. Wilkins, the policies would not have been delivered and payment of the premium would not have been accepted (41, 44 and 47).

On October 30, 1939, Mr. Wilkins died of coronary thrombosis due to myocarditis, chronic, of six months duration (6 and 125), the death certificate having been signed by Dr. E. C. Swift (126).

The United States Circuit Court of Appeals for the Fifth Circuit by a divided Court, on February 18, 1941 reversed the judgment of the United States District Court (137-143).

The dissenting member of the Court adopted the opinion of the United States District Court, reported in 33 F. Supp. 117 (142).

Petition for Rehearing was filed (144) and denied on March 20, 1941 (150).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by Act of February 13, 1925, c 229 Section 1, 43 Stat. 938, U.S.C.A. Title 28, Sec. 347(a). The requisite diversity of citizenship and amount in controversy appear from the pleadings in the District Court (2 and 4).

QUESTIONS PRESENTED

The questions presented by this petition rest upon the ruling of the Circuit Court of Appeals as stated in the majority opinion (137) reversing the judgment of the District Court (100-112).

The dissenting opinion (142) adopts the opinion of the District Court (100), which opinion is reported in 33 F. Supp. 117.

The questions relate to Florida contracts and may be stated as follows:

1. Is it the duty of the Federal Courts in construing Florida contracts of insurance, to follow the decisions of the Supreme Court of Florida, which is the Court of last resort?

The Circuit Court of Appeals declined to follow the decisions of the Supreme Court of Florida and declined to apply the doctrine recognized by that Court and announced in its opinions.

2. Thirteen days before the date of the judgment now complained of, the United States Circuit Court of Appeals for the Fifth Circuit filed an opinion recognizing the rule of law under the Florida decisions to be that if an applicant for life insurance knowingly makes a false statement of fact (not a mere statement of opinion), such as a negative answer to a question as to whether the applicant had consulted a physician within the past five years, such false answer is material as a matter of law and prevents recovery on the

policy without regard to whether the answer was given with a conscious, fraudulent purpose to deceive.

In such circumstances, was it the duty of the United States Circuit Court of Appeals to follow and apply in this case, the same recognized Florida doctrine which remained unchanged?

The Circuit Court of Appeals declined to follow and apply the Florida rule of law.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. Because in answering the questions stated next above, the majority opinion of the Circuit Court of Appeals is in conflict with the applicable decisions of the Court of last resort in Florida, this is to say, the Supreme Court of Florida in the case of *New York Life Insurance Company vs. Kincaid,* 122 Fla. 283, 165 So. 553, *Thompson vs. New York Life Insurance Company,* 143 Fla. 534, 197 So. 111, and *Winer vs. New York Life Insurance Company,* 143 Fla. 652, 197 So. 487.

2. Because in answering the questions stated next above, the majority opinion of the Circuit Court of Appeals is in conflict with the rule of law in Florida, the existence of which rule was recognized by this Court in *Mutual Life Insurance Company vs. Hilton-Green,* 241 U. S. 613, 36 S. Ct. 676, 60 L. Ed. 1202, and which rule of law had been recognized by the United States Circuit

Court of Appeals for the Fifth Circuit thirteen days before the date of the judgment now assailed in the case of *Metropolitan Life Insurance Company vs. Madden,* 117 F (2) 446.

3. Because in answering the questions stated next above, the majority opinion of the Circuit Court of Appeals is in conflict with the applicable decisions of this Court, that is to say, the case of *Stipcich vs. Metropolitan Life Insurance Company,* 277 U. S. 311, 48 S. Ct. 512, 72 L. Ed. 895, and *Piedmont and Arlington Life Insurance Company vs. Ewing,* 92 U. S. 377, 23 L. Ed. 610, the doctrine of which cases constitute the law of Florida as announced by the Supreme Court of Florida in *Massachusetts Bonding & Insurance Company vs. Hoxie,* 129 Fla. 332, 176 So. 480.

Petitioner presents herewith a certified transcript of the record in the case in the Courts below, including the proceedings in the United States Circuit Court of Appeals for the Fifth Circuit, and also presents a supporting brief of Petitioner's counsel which is annexed to this petition.

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of

the record and all proceedings in the case numbered and entitled on its docket, "Number 9640. Mildred T. Wilkins, Appellant, versus Travelers Insurance Company, Appellee"; and that said judgment of the said United States Circuit Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court, and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem mete and just.

THE TRAVELERS INSURANCE COMPANY,
a corporation.

By Francis M. Holt,
Counsel for Petitioner.